S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RALPH DALEY,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF CHESTERFIELD and ZONING BOARD OF APPEALS OF THE CHARTER TOWNSHIP OF CHESTERFIELD,

Defendants-Appellees.

UNPUBLISHED
March 27, 2007

No. 265363
Macomb Circuit Court
LC No. 2004-005355-CZ

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

In this case involving a challenge to the constitutionality of a zoning ordinance, plaintiff appeals as of right from an order dismissing his complaint. Plaintiff objects to defendants' use of the ordinance to disallow plaintiff's installation of two sixteen-foot-long doors on his garage. We affirm the dismissal of the complaint.

Plaintiff first contends that the zoning ordinance at issue is unconstitutionally vague in that it does not provide fair notice of the conduct proscribed and grants the local zoning board of appeals (ZBA) unfettered discretion in its application. We disagree.

This Court reviews de novo whether an ordinance is unconstitutional. *Van Buren Township v Garter Belt, Inc*, 258 Mich App 594, 627; 673 NW2d 111 (2003). Only if there is no possible reasonable construction that would render an ordinance constitutional must a court strike it down. *Counsel of Organization and Others for Education about Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997).

All statutes and ordinances are presumed to be constitutional and are construed so unless their unconstitutionality is clearly apparent. *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 341-342; 675 NW2d 271 (2003). The party challenging the ordinance has the burden of rebutting the presumption. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 539; 669 NW2d 594 (2003). In evaluating an ordinance challenged as unconstitutionally vague, the entire text of the ordinance should be examined and the words of the statute should be given their ordinary meanings. *Dep't of State Compliance & Rules Division v Michigan Education Association - NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002).

"The 'void for vagueness' doctrine is derived from the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001). A statute or ordinance may be challenged for vagueness on three grounds: (1) that it is overbroad and impinges on First Amendment freedoms; (2) that it does not provide fair notice of the conduct proscribed; and (3) that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the statute or ordinance has been violated. *Dep't of State Compliance, supra* at 116.

Plaintiff first argues that the ordinance is unconstitutionally vague in that it does not provide fair notice of the conduct proscribed. To give fair notice, a statute or ordinance must give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 469; 688 NW2d 523 (2004) (internal citation and quotation marks omitted). A statute cannot use terms that require persons of common intelligence to guess at the statute's meaning and differ with regard to its application, but the statute need not define an offense with mathematical certainty. *Grievance Administrator v Fieger*, 476 Mich 231, 255; 719 NW2d 123 (2006); *Associated Builders & Contractors, Saginaw Valley Area Chapter v Director, Dep't of Consumer & Industry Services (On Remand)*, 267 Mich App 386, 398; 705 NW2d 509 (2005). "A statute is sufficiently definite if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of the words." *Associated Builders & Contractors, supra* at 386 (internal citations and quotation marks omitted). The language of the statute must only be reasonably precise. *Department of State Compliance, supra* at 116. The inclusion of a "reasonable person standard" in a statute or ordinance is sufficient to give fair notice of the conduct proscribed. *Plymouth Twp v Hancock*, 236 Mich App 197, 201; 600 NW2d 380 (1999).

The relevant ordinance, § 76-331(a)(2)(a), states:

> One accessory building, whether attached or detached, shall be permitted for each lot within a platted subdivision or on [a] residential parcel of one acre or less. *In no case shall such building be designed to house more than three cars,* nor shall it exceed 920 square feet. [Emphasis added.]

Plaintiff's architectural plans depicted a garage, approximately 910 square feet in area, with two sixteen-foot-long garage doors. The record reflects that one way in which a garage designed to hold more than three cars is manifested is by having two sixteen-foot-long doors. Shawn Shortt, a building inspector with the township, stated in his affidavit that "any garage, or structure, with two 16 foot garage doors is designed to house four vehicles, based on my experience." Additionally, minutes of the June 9, 2004, board meeting made clear that plaintiff sought a variance in order to build a "4-car garage." Shortt's affidavit further stated:

> When I approved [plaintiff's] plans, I personally informed Mr. Daley that he must either obtain a variance or switch out one double door for a single door on his garage because the Chesterfield Township Zoning Ordinance requires a garage be designed to house no more than three vehicles. Mr. Daley agreed to apply for and request a variance.

* * *

> Since § 76-331(a)(2)(a) limiting accessory structures to 920 square feet and being designed to house no more than three vehicles became effective in December, 2003, the Building Department has not issued a building permit for construction of a residence/garage showing installation of two 16 foot garage doors without instructing the applicant to seek a variance from the ZBA.

Plaintiff contends that because the ordinance does not specifically mention doors, it cannot properly be interpreted as regulating doors. To the contrary, the township is not required to define every concept implicated by the ordinance, such as the number and size of garage doors, in minute detail. See, generally, *Department of State Compliance, supra* at 116-117 (noting that a statute must be "reasonably precise"). Defendants point out that the ordinance provision in question is one paragraph of a 195-page zoning ordinance and that the ordinance is not relegated to detailing specific construction aspects of structures, but, rather, its purpose is to regulate land development generally. Defendants argue that including further detail, such as the number and size of doors permitted on each structure, is not required.

In our opinion, insofar as the number of doors suggests that the garage in question is designed to house more than three cars, the doors are properly regulated by the ordinance. A reasonable person would conclude – as did the township building inspector, the planning and zoning administrator, and the ZBA – that a garage with two sixteen-foot-long doors is designed to house four cars. Plaintiff himself, when presenting the matter to the ZBA, indicating that he wanted two sixteen-foot-long doors, in part, so he could have a "4-car garage." Accordingly, the trial court did not err in holding that the ordinance provides fair notice of the conduct proscribed. *Counsel of Organization and Others for Education about Parochiaid, Inc, supra* at 568 (noting that a statute or ordinance should be struck down only when there is no possible reasonable construction that would render it constitutional).

Plaintiff also argues that the ordinance lacks guidelines and confers unfettered discretion to the ZBA. A statute may be unconstitutionally vague based on the encouragement of arbitrary and discriminatory enforcement when it confers unstructured and unlimited discretion to determine whether an offense has been committed. *Owosso v Pouillon*, 254 Mich App 210, 215; 657 NW2d 538 (2002). It seems evident, then, that to provide adequate guidelines, a statute or ordinance must provide standards for enforcing and administering the law sufficient to ensure that enforcement is not arbitrary or discriminatory. The standards should be as reasonably precise as the subject matter requires or permits. See *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 305; 539 NW2d 761 (1995). The inclusion of a reasonable person standard serves to prevent arbitrary enforcement. *Plymouth Twp, supra* at 201.

The evidence on the record indicates that defendants do not operate with unfettered discretion in applying the ordinance. In accordance with the ordinance, any accessory structure that is no more than 920 square feet and is designed to house no more than three cars will be approved by the township. Plaintiff presents no evidence to suggest otherwise. What plaintiff

does present is an assertion that there are a handful of homes in the neighborhood of plaintiff's home that have either two sixteen-foot-long doors or four to five eight-foot-long doors. Building inspector Shortt stated in his affidavit that since § 76-331(a)(2)(a) became effective in December 2003,[1] the Building Department has not issued a building permit for construction of a garage showing the installation of two sixteen-foot-long garage doors without instructing the applicant to seek a variance from the ZBA. All but one of the homes plaintiff referred to are homes that were built before the effective date of the ordinance. The remaining house is presently in the process of being constructed and is required to receive a variance before a final certificate of occupancy will be issued.

The ordinance contains adequate standards with which to guide defendants in applying it, and it appears to be applied consistently throughout the township. Thus, the trial court did not err in ruling that the ordinance does not confer unfettered discretion to defendants. See *Natural Aggregates Corp, supra* at 303-305 (ordinance that read "[t]he permit shall be issued in the event the Township Board shall determine that the issuance of the permit would not detrimentally affect the public health, safety, morals and general welfare of the citizens of Brighton Township" was upheld as not conferring unlimited discretion to the township board).

Plaintiff next contends that the ordinance denies plaintiff state and federal due process because the moving factor behind it is aesthetics; plaintiff contends that the ordinance therefore bears no direct or substantial relation to the police power. We disagree.

To establish that a zoning regulation violates plaintiff's substantive due process rights, plaintiff must show

> (1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question. [*Frericks v Highland Twp,* 228 Mich App 575, 594; 579 NW2d 441 (1998).]

Aesthetics may be a consideration but cannot be the moving factor behind a zoning ordinance. *Ottawa County Farms Inc v Polkton Township,* 131 Mich App 222, 229; 345 NW2d 672 (1983). Three basic rules of judicial review are applicable here:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion

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[1] Before 2001, the accessory structure could be no larger than two-thirds of the size of the ground floor of the principal structure. In July 2001, the ordinance was amended to allow accessory structures to be a maximum of 720 square feet. The record is unclear regarding whether these ordinances contained a provision limiting the number of cars the accessory structure was permitted to house.

concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Frericks, supra* at 594.]

Although plaintiff asserts that the ordinance is based solely on aesthetics, the evidence shows otherwise. The Planning and Zoning Administrator for the township provided information in her affidavit regarding the evolution of the ordinance. The previous version of the ordinance did not allow accessory structures to exceed 720 square feet. Builders, homeowners, architects, and contractors frequently complained to the Planning Department and the ZBA that the ordinance did not allow sufficient room for three cars to be placed in a garage and for the doors of the cars to be opened and for people to be able to move about. After holding numerous public hearings, consulting the Township's planning expert, and receiving input from residents, builders, and contractors, the Township Planning Commission amended the ordinance to allow a garage to be 920 square feet and designed to house three cars. The 920-square-feet provision was enacted to allow additional room to move around the vehicles and to allow for storage of miscellaneous items. The provision was never intended to allow for the housing of more than three cars. The provision, as it stands presently, was predicated on (1) information concerning the housing characteristics of Macomb County, as provided by the United States Census Bureau, indicating that less than one percent of Macomb County families have more than three cars, and (2) substantial input from builders, residents of the community, contractors, and architects. Regarding the number of cars an accessory structure should be designed to house, defendants had to draw the line somewhere. After garnering data from various sources, defendants determined that a three-car limitation was reasonable. The provision is not based solely on aesthetics, and nor is it altogether unreasonable. The trial court did not err in ruling that the provision is constitutionally valid.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter